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CHARLES ELMORE CR
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IN THE
Supreme Court of the United States

Term, 1949.

132-133

No.

~~879-880~~ 132-1

FLORENCE T. SMITH and JOHN M. SMITH, her husband; BENJAMIN D. FENIMORE; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, and FRANCIS A. SMITH,

Respondents,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

vs.

BENJAMIN D. FENIMORE,

Respondent.

ABIGAIL STERNER,

Respondent,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

vs.

BENJAMIN D. FENIMORE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

✓ HAROLD SCOTT BAILE,

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Phila. 10, Pa.,

BERNARD J. O'CONNELL,

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IN THE
SUPREME COURT OF THE UNITED STATES.

No.

Term, 1949.

FLORENCE T. SMITH and JOHN M. SMITH, her husband; BENJAMIN D. FENIMORE, BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, and FRANCIS A. SMITH,
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vs.

PHILADELPHIA TRANSPORTATION COMPANY,
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ABIGAIL STERNER,
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Petitioner,

vs.

BENJAMIN D. FENIMORE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of Philadelphia Transportation Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, respectfully represents:

This is a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review judgments affirming judgments of the United States District Court for the Eastern District of Pennsylvania.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

These actions arose out of a grade crossing collision in Pennsylvania between an automobile and an interurban trolley car of the petitioner, Philadelphia Transportation Company, hereinafter referred to as "P. T. C." The automobile was operated by Benjamin D. Fenimore and owned by Francis A. Smith. Riding in the automobile as passengers were Benjamin John Fenimore, the driver's minor son, Mrs. Florence T. Smith and Mrs. Abigail Sterner (118-119a).

On July 12, 1946, at about 1:20 in the afternoon, Fenimore was driving in a general westwardly direction from Philadelphia toward Chester on the Industrial Highway, which is divided by a grass island with two lanes of traffic in each direction (Pf. Ex. 10, 189a). Visibility was good and the surface of the highway dry (139a). A crossing is indicated by official highway signs posted on the north or right-hand side at distances of 224 feet and 98 feet from the tracks.

Before reaching the intersection Fenimore pulled out from the right-hand lane and assumed a position with his front wheels abreast of the rear wheels of a truck traveling in the same direction which remained in the right lane, and proceeded at 35 miles per hour in this way for about 1200 feet (120a). As they approached the crossing, the truck slowed down and came to a stop about 10 feet from the westbound tracks (66a, 70a). Fenimore did not slacken speed but passed the truck, cleared the westbound tracks and the dummy, and immediately upon entering the east-bound tracks collided with a P. T. C. trolley which was more than halfway across the 24-foot roadway and traveling 20 to 25 miles per hour. Fenimore admitted that he did not see the trolley until it was almost on top of him (121a). Fenimore had traveled approximately 45 feet beyond the truck, during which time he had a clear and unobstructed view along the tracks before the collision took place (Pf. Ex. 10, 189a).

As a result of the accident the Fenimore child was killed, the other occupants of the car were injured, and the car, itself, demolished. In two actions P. T. C. was sued by all of the occupants of the car and by the owner on the ground that the negligence of its motorman had caused the collision. Federal jurisdiction was based on diversity of citizenship (5a, 46a). In both actions P. T. C. joined the driver, Fenimore, as third party defendant on the ground that his negligence was either the sole or a joint cause of the accident (14a, 49a).

In response to specific questions propounded by the trial judge, the jury found the motorman negligent and exonerated Fenimore completely of any blame (181a). In denying P. T. C.'s motion for judgment for contribution from Fenimore, the trial judge, the Honorable T. Blake Kennedy of the District of Wyoming, specially presiding, said:

"I am frank enough, really, to say that I think there is some question of doubt on that particular point as to whether or not there was contributory negligence as a

matter of law in the way that that car was being driven at the time of the crossing" (186a).

Judgments were entered against P. T. C. on the jury's verdicts totaling \$96,800 (181-182a). These judgments were affirmed on appeal to the United States Court of Appeals for the Third Circuit. Judge Goodrich wrote the opinion of the court in which Judge McLaughlin concurred. On the question of Fenimore's negligence he said (196):

"Certainly the finding that he was negligent would have been impregnable against attack. It is not so easy to support a finding that he was not negligent."

Judge Kalodner, in a separate opinion, concurred in part and dissented in part. He agreed that there was a basis for the finding that P. T. C. was negligent and, accordingly, the judgments in favor of the automobile passengers should be affirmed; but he went on to state (198):

"In my opinion, however, the testimony clearly establishes that Fenimore was guilty of contributory negligence as a matter of law under the Pennsylvania decisions and accordingly the judgments entered in his favor, individually and in the two claims arising out of his minor son's death, should be set aside.

"Since Fenimore was negligent, the P. T. C. as third-party plaintiff is entitled to a judgment against him for contribution toward the judgments obtained against it by the other plaintiffs above named. Fenimore's own testimony and that of his witness clearly establish his contributory negligence."

The single question we are asking this Court to review is the one upon which the Court Below divided; namely, whether Fenimore, the operator of the automobile, was guilty of contributory negligence as a matter of law under the decisions of the highest court of Pennsylvania. It is our position that the Court Below has denied the applica-

tion of the controlling rules in Pennsylvania as required by the decision of this Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1937).

STATEMENT OF BASIS UPON WHICH IT IS CON-
TENDED THE COURT HAS JURISDICTION.

The statute under which jurisdiction is involved is Section 1254 (1) of the Act of June 25, 1948, C. 646 (28 U. S. C. A., Section 1254).

The date of the mandate of the Court of Appeals for the Third Circuit is April 4, 1949. The date of the order of the Third Circuit denying P. T. C.'s petition for reargument is March 21, 1949.

The case involves an important question of local law which has been resolved by the Third Circuit in a way which is in conflict with applicable local decisions. The District Court ruled that the jury could find the driver of the automobile was not guilty of negligence. The Circuit Court affirmed the decisions of the District Court. This ruling is in conflict with the settled law of Pennsylvania.

QUESTIONS PRESENTED.

Where a motorist, traveling on a dual lane highway for the first time, passed to the left of a truck which was stopped at a clearly visible grade crossing to permit an interurban trolley to cross, and the automobile collided with the trolley the instant it reached the tracks,

(1) Did not the evidence, viewed in the light most favorable to the motorist, conclusively establish his negligence as a matter of law under applicable Pennsylvania decisions?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) The standard of conduct of a motorist approaching a grade crossing in Pennsylvania has been fixed by decisions of the Supreme Court of that state. See *Restatement, Torts*, Section 285, Pennsylvania Annotations; *Pieper v. Union Traction Co.*, 202 Pa. 100, 51 A. 739 (1902); *Keenan v. Union Traction Co.*, 202 Pa. 107, 51 A. 742 (1902). A motorist is duty bound to look and listen immediately before entering each set of tracks and to have his car under such control that he can stop if a trolley car is approaching: *Gallagher v. Phila. R. T. Co.*, 103 Pa. Superior Ct. 232, 157 A. 321 (1931); *Moore v. Erie Rys. Co.*, 308 Pa. 573, 162 A. 812 (1932); *Lessig v. Reading Transit & Light Co.*, 270 Pa. 299, 113 A. 381 (1921); *Moses v. Northwestern Pa. Ry. Co.*, 258 Pa. 537, 102 A. 166 (1917); *Patton v. George*, 284 Pa. 342, 131 A. 245 (1925); *Ferencz v. Pittsburgh Railways Co.*, 341 Pa. 369, 19 A. 2d 385 (1941); *Weldon v. Pittsburgh Rwy. Co.*, 352 Pa. 103, 41 A. 2d 856 (1945). Where a motorist is struck immediately upon reaching the tracks, it will be conclusively presumed that he failed to perform his duty: *Ehrhart v. York Rys. Co.*, 308 Pa. 566, 162 A. 810 (1932); *Leaman Transp. Corp. v. P. T. C.*, 358 Pa. 625, 57 A. 2d 889 (1948). These rules have been stated by the highest court of the state to be "inflexible" and "an unbending rule to be observed at all times, and under all circumstances": *Ehrisman v. East Harrisburg City Pass. Ry. Co.*, 150 Pa. 180, 24 A. 596 (1892).

The opinion of the Circuit Court recognized that the motorist in this case failed to conform to the standard required by these rules, but refused to rule that he was guilty of negligence as a matter of law, excusing his conduct under the "special circumstances of the case." The Court Below thus denied the application of controlling Pennsylvania law

and established a standard of care according to its own concept in contradiction of the rules applicable in the Pennsylvania courts. It is our position that this is a departure from the mandate of this Court in *Erie R. Co. v. Tompkins*, supra, and invites the resurrection of the main mischief sought to be cured by that decision. The Court of Appeals has given lip service to the decision of this Court and at the same time has ignored the applicable and controlling decisions of the highest courts of Pennsylvania.

The rules controlling the standard of conduct of motorists at grade crossings are firmly embedded in the Pennsylvania law of negligence. The decision of the Court of Appeals establishes a different standard where the case is tried in the Federal Courts. As was said by Chief Justice Hughes in *Fidelity Trust Co. v. Field*, 311 U. S. 169, 179 (1940), "it is inadmissible that there should be one rule of state law for litigants in state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship." In *Conway v. O'Brien*, 312 U. S. 492 (1940), this Court granted a certiorari where the Circuit Court of Appeals for the Second Circuit had erroneously interpreted the decisions of the highest court of Vermont in a tort case where the law of that state was controlling. The Circuit Court of Appeals for the Third Circuit has committed the same error in this case.

(2) The "special circumstances" which the Court Below held excused the motorist from conforming to the standard of care established by the Pennsylvania decisions were the facts that he was unaware of the crossing and that he had no reason to know of its existence. These excuses are unknown in the law of Pennsylvania. Where the presence of a railway crossing should be obvious to anyone reasonably using his ordinary powers of observation, a motorist will not be relieved of the duty imposed by law by reason of his ignorance of such crossing. This principle has been applied by the Pennsylvania courts in cases in which

the contention was made that automobile drivers were not to be held accountable for compliance with the rule of "stop, look and listen" at railroad crossings where they asserted they were ignorant of its existence by virtue of their unfamiliarity with the highway or by reason of darkness. In such cases the Pennsylvania Supreme Court has uniformly held that those using a highway at night, or being unfamiliar therewith, must inform themselves of possible dangers that may lie in their path of travel and not proceed blindly ahead: *Anspach v. Phila. & Reading Ry. Co.*, 225 Pa. 528, 74 A. 373 (1909); *Serfas v. Lehigh & New Eng. R. R. Co.*, 270 Pa. 306, 113 A. 370 (1921); *Kelly v. Director Gen. of R. R.*, 274 Pa. 470, 118 A. 436 (1922); *Eline v. Western Maryland Ry. Co.*, 262 Pa. 33, 104 A. 857 (1918). In *McCann v. P. R. R. Co.*, 119 Pa. Superior Ct. 205, 208, 180 A. 750 (1935), the plaintiff, driving on an unfamiliar highway at night, failed to see the tracks of a crossing until he was upon them. In denying a recovery for injuries received as a result of being struck by a train, the court said:

"The failure of plaintiff to observe the grade crossing clearly indicated that he did not look where he was driving in which event he was guilty of contributory negligence: * * *"

The Court of Appeals refused to apply this firmly established rule, and in doing so, misinterpreted the decision of the Supreme Court of Pennsylvania in the case of *Kindt v. Reading Co.*, 352 Pa. 419, 43 A. 2d 145 (1945). In that case the only issue was whether plaintiff had produced positive evidence that the train had failed to sound a warning signal. There was no question of contributory negligence and no contention by the defendant railroad that the crossing could or should have been seen. Railroad's counsel in that case clearly stated in his brief: "Both at the trial and later in the argument in the court below, no imputation of contributory negligence was made against the plaintiffs." Thus, that case has no application to the ques-

tion of whether Fenimore was guilty of contributory negligence as a matter of law; and that is the case cited by the Court of Appeals as authority for excusing Fenimore's non-conformance with the standard of care required under the circumstances.

Exhibits in the form of photographs taken on the day of the accident and *introduced by plaintiffs* show that the rails of the crossing could be seen from over 200 feet; that the overhead trolley wires crossed the highway; that the trolley tracks were adjacent to the highway on the left for almost half a mile before the crossing and plainly visible to traffic on the left lane; and that the highway curved to the left near the scene of the accident and crossed the tracks.

The existence of these physical facts is indisputably shown by the *photographs introduced by plaintiffs*. The *photographs were taken on the day of the accident*. Plaintiffs' witness the truck driver, testified that "they accurately show the conditions of visibility and what you could see at the time of the accident" (74a). The opinion of the Court Below overrides these indisputable physical facts established in the plaintiffs' own case, saying that it did not think the tracks were "equally clear to a driver of a car working his way along the highway."

The Court of Appeals considered the case of *Rea v. Pittsburgh Rys. Co.*, 146 Pa. Superior Ct. 251, 255, 22 A. 2d 68 (1941), as authority for finding "special circumstances" to excuse Fenimore's conduct. In that case the collision between an automobile and a trolley car occurred in the center of the business district of Pittsburgh where several main arteries converge at one intersection. There was an elaborate system of traffic lights. The driver of the car, who had stopped for a red light, proceeded to enter the intersection when the light turned green. On his left were two lanes of traffic moving in the same direction. A trolley came through the red light and crashed into him. His vision was obscured by the cars to his left. In holding he was not guilty of contributory negligence as a matter of law, the court stated:

"* * * He had relied upon the invitation of the traffic signals and from necessity, to some extent upon the movement of automobiles to his left and to the judgment of those drivers who were in a position to see."

This ruling, if anything, supports our contention that Fenimore should have been guided by the action of the truck. Had he done so, no accident would have occurred. Furthermore, the court's opinion was based entirely upon the fact that the driver had the right to assume that the trolley car would comply with the traffic signal. Fenimore had no such right since there were no traffic signals at this crossing. That case, therefore, is clearly not authority for excusing Fenimore's nonconformance with the settled Pennsylvania rules.

CONCLUSION.

The standards of care which have been established by the Pennsylvania Supreme Court concerning motorists driving onto grade crossings are an expression of the settled public policy of the state. It is a policy dictated by the belief that accidents can be prevented by requiring motorists to exercise a higher degree of care and to defer to the right of way of trolley cars. This record reveals affirmatively that Fenimore did not conform to the required standard. Under such circumstances it seems only proper that his insurance carrier should be required to assume his share of the damages. That would have been the result had the case been tried and determined in the state courts. We, therefore, ask this Court to grant a writ of certiorari in order that the decision in this case will conform to the

law of Pennsylvania and the loss sustained will be shared equally by those responsible.

Respectfully submitted,

HAROLD SCOTT BAILE,
BERNARD J. O'CONNELL,
FREDERIC L. BALLARD,
Attorneys for Petitioner.

FILED

JUL 16 1949

IN THE

Supreme Court of the United States

Term, 1949.

No. 132.- 133

FLORENCE T. SMITH and JOHN M. SMITH, her husband,
BENJAMIN D. FENIMORE, BENJAMIN D. FENI-
MORE, Administrator of the Estate of Benjamin John
Fenimore, Deceased, BENJAMIN D. FENIMORE, Admin-
istrator of the Estate of Benjamin John Fenimore, Deceased,
Trustee ad litem for Benjamin D. Fenimore and Elizabeth
S. Fenimore, his wife; and FRANCIS A. SMITH,

Respondents,

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PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

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BENJAMIN D. FENIMORE,

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PHILADELPHIA TRANSPORTATION COMPANY,

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Respondent.

**ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

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IN THE
Supreme Court of the United States.

No. . TERM 1949.

FLORENCE T. SMITH AND JOHN M. SMITH, HER HUSBAND, BENJAMIN D. FENIMORE, BENJAMIN D. FENIMORE, ADMINISTRATOR OF THE ESTATE OF BENJAMIN JOHN FENIMORE, DECEASED, BENJAMIN D. FENIMORE, ADMINISTRATOR OF THE ESTATE OF BENJAMIN JOHN FENIMORE, DECEASED, TRUSTEE AD LITEM FOR BENJAMIN D. FENIMORE AND ELIZABETH S. FENIMORE, HIS WIFE; AND FRANCIS A. SMITH,

Respondents,

v.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

v.

BENJAMIN D. FENIMORE,

Respondent.

ABIGAIL STERNER,

Respondent,

v.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

v.

BENJAMIN D. FENIMORE,

Respondent.

**ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

*To the Honorable, the Justices of the Supreme Court of the
United States:*

Philadelphia Transportation Company, a corporation organized under the laws of the Commonwealth of Pennsylvania, having presented in the within captioned matter a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review judgments affirming judgments of the United States District Court for the Eastern District of Pennsylvania, Benjamin D. Fenimore, Benjamin D. Fenimore, Administrator of the Estate of Benjamin John Fenimore, Deceased, Benjamin D. Fenimore, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, make answer to the allegations contained in said petition for writ of certiorari as follows:

**COUNTER SUMMARY STATEMENT OF THE MATTER
INVOLVED.**

As set out in the petition for writ of certiorari by the Philadelphia Transportation Company, the facts relating to the accident are substantially correct except that the summary statement of the matter involved fails to set out that Mr. Fenimore had never been over the highway before, was unfamiliar with the route and that the highway is a great industrial artery of travel in Eastern Pennsylvania. The petitioner's statement of facts fails to disclose that the trolley car, in approaching this congested highway, though operated by a motorman thoroughly familiar with the crossing, did not stop before entering the intersection (Record, pages 71a, 84a, 146a) and that when the operator of the trolley car saw the westbound motor traffic in the inner lane, he applied the brakes and jumped toward the

exit door, leaving the controls unattended (Record, page 100a).

The statement by the Philadelphia Transportation Company also fails to point out that at the point where the accident occurred, there was no street or intersection where the trolley car crosses (Record, page 112a). The tracks were level with the bed of the highway and there was nothing to differentiate the crossing from the pavement of the highway generally (Record, pages 113a, 132a) and further fails to point out that at every crossing of this Industrial Highway from Philadelphia to Chester, except at the point where the accident occurred, there is either a stop sign against the street entering the Industrial Highway or a traffic light controlling the intersection (Record, page 113a). At the scene of the accident, the road itself passes through open country with swampland on both sides of the road (Record, pages 65a, 67a).

The Philadelphia Transportation Company points out in its summary that the crossing is indicated by official highway signs posted on the north or right hand lane at a distance of two hundred twenty-four feet (224') and ninety-eight feet (98') from the tracks, but fails to state that there were no signs on the left side of the southbound lane used by Mr. Fenimore while proceeding westwardly which would indicate the presence of a railway or trolley crossing at the site of the accident (Record, page 121a) and that he could not see the warning signs along the outside lane because his view was obstructed by a large truck running parallel with him (Record, page 120a).

STATEMENT OF BASIS UPON WHICH IT IS CON- TENDED THE COURT HAS JURISDICTION.

The Philadelphia Transportation Company, in its petition for writ of certiorari, under this heading states that the case involves an important question of local law which has been resolved by the Third Circuit in a way which is in conflict with applicable local decisions, which ruling, con-

tends the Philadelphia Transportation Company in its petition, is in conflict with the settled law of Pennsylvania.

It is respectfully submitted that the ruling of the Third Circuit Court affirming the District Court is in conformity with the settled law of Pennsylvania.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

Where a motorist, traveling on a dual lane highway for the first time, in the inside lane thereof to the left of a large panel body truck traveling in the outside lane and parallel with the motorist which stops suddenly at a grade crossing to avoid collision with an interurban trolley crossing the dual lane highway without stopping and invisible to the motorist until the moment of collision, collides with said interurban trolley.

(1) Does not the evidence, viewed in the light most favorable to the motorist, clearly indicate that the question of negligence on the part of the motorist is one of fact to be determined by a Jury?

ANSWER TO REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Philadelphia Transportation Company, throughout this case, has taken the position that the law in Pennsylvania having to do with the duty of a motorist to look and listen immediately before entering each set of tracks and to have his car under such control that he can stop it if a trolley car is approaching is absolute and inflexible. Throughout the case and in this petition, the Philadelphia Transportation Company has contended that the law of Pennsylvania gives trolley cars a "divine right-of-way". This is not the law of Pennsylvania.

As pointed out by the Philadelphia Transportation Company in this petition, the opinion of the Circuit Court recognized that there were special circumstances in this case which succinctly put, meant that Mr. Fenimore, a

stranger to the scene, legally using the inner lane of a dual highway, deprived of notice of the existence of the trolley crossing by lack of signs visible to him, traveling at a lawful rate of speed, is suddenly met with a trolley car, heretofore invisible to him, crossing a busy highway without stopping. These were the facts as testified to by the witnesses and the District Court and the Circuit Court held that they were questions of fact for the Jury in determining the question of negligence on the part of Mr. Fenimore, and this is in conformity with the controlling law in the State of Pennsylvania.

The Philadelphia Transportation Company contends in this petition that the "inflexible" and "unbending rule to be observed at all times and under all circumstances" requires a motorist to look and listen immediately before crossing tracks and to proceed at his peril. It has been contended by counsel for Mr. Fenimore and others throughout this case that such is not the inflexible rule in Pennsylvania and that if it were, then double lines of traffic on dual highways would be useless and the inner lane could never move because its view would always be obstructed by traffic in the outer lane. That this rule is not inflexible and that dual highways must present special circumstances is recognized by the Commonwealth of Pennsylvania in its statutory enactment of *June 27, 1939, P. L. 1135, Section 24, 75 Purdon's Statutes 543, Section C*, where it is enacted

"The driver of a vehicle shall not overtake or pass any other vehicle proceeding in the same direction at any railroad grade crossing * * * except on a highway having two (2) or more lanes for movement of traffic in one direction, the driver of a vehicle may overtake or pass another vehicle."

The leading case in Pennsylvania which applies to the set of circumstances in the present case is *Rea, Appellant v. Pittsburgh Railways Company*, 146 Pa. Sup. Ct. 252, 22 A. (2) 68 (1941). In this case, the court considers at length

the rule of law holding that an absolute duty is imposed upon a motorist to look for street cars immediately before going on the track and the failure to do so is negligence per se. The Court in that case says that if these cases laying down the aforementioned rule of law be examined, it will be found that they have to do with the drivers of vehicles in the ordinary intersection of two streets with occasional varying conditions insufficient to effect the "absolute" or unbending application of the rule where the facts are clear. The Court goes on to say:

"But this was no ordinary intersection of two lines of travel as the undisputed facts and the plot in evidence will show. * * * Traffic from two boulevards and from many streets, a number of which are main arteries of travel from the east, converge in the neighborhood of the crossing. * * * Sixth Avenue also is subject to much interstate traffic because of its access to the Liberty Tunnels. * * *

"In the light of all the attendant circumstances, we think the question of plaintiff's negligence was for the jury."

The intersection in question in the *Rea* case was a dual highway. There were three lanes of traffic southbound. All motor traffic was stopped by a red light. When it turned green, all three lanes of traffic proceeded southwardly. The plaintiff was in the west lane of the southbound traffic. The trolley car was proceeding from the east. As all three lanes of traffic proceeded into the intersection, the plaintiff motorist could not see to the east because of the intervening lanes of traffic—exactly the same situation as in our case—except that in the *Rea* case concededly the plaintiff knew of the existence of the trolley tracks. As the three lanes of traffic proceeded across the trolley car tracks, the automobile to the left of the plaintiff stopped suddenly just as happened in this case. The plaintiff in the westerly lane of traffic did not have time to stop and there was a collision just as

in our case. The only difference in the two cases was that in the *Rea* case, there were traffic signals and the plaintiff knew of the existence of the tracks. In our case, there were no signals and the motorist did not know of the existence of the tracks. The significance of the *Rea* case, in addition to demonstrating that the superior right-of-way of trolley cars is not absolute and inflexible, is that it recognizes and states the rule in regard to trolley crossings at the intersection with highways carrying dual lanes of traffic, and the Court, in laying down the rule in such cases, says:

"If there was an absolute duty on every driver of an automobile to enter upon defendant's tracks *in this intersection* only after he had seen for himself that there was no street car approaching, the purpose of the traffic signals near the intersection *and the utility of the multiple lanes of travel would be defeated*. Conceivably during rush hours every driver in two of the three lanes would have to come to a stop and await an opportunity for an unobstructed view along defendant's tracks before proceeding, thus causing unnecessary congestion with possible increased hazards of travel.

"* * * we think whether that duty was imposed upon plaintiff was not one of law for the court, but for the jury in applying the test of reasonable diligence and care under the circumstances." (Emphasis supplied.)

and the court reversed the judgment n. o. v.

In the present case if under the circumstances, the rule requiring motorists to stop and look both ways at each trolley track is absolute, the whole purpose of dual traffic lanes would be defeated. No motorist in any lane could ever see *both ways* when traffic was moving in all lanes and no motorist could ever see conditions on the tracks on the side where his view was blocked by other moving traffic in the dual lanes. It is therefore respectfully submitted that the

rule that the motorist must yield the superior right-of-way to a street railway car is not absolute but its applicability is to be determined by the circumstances, and where the circumstances are as they were in the present case, the matter is for the jury just as was done in this case.

The petitioner herein asserts that the Court of Appeals misinterpreted the decision of the Supreme Court of Pennsylvania in the case of *Kindt v. Reading Co.*, 352 Pa. 419, 43 A. (2d) 145 (1945) and attempts to differentiate the facts in the case of *Rea v. Pittsburgh Railways Company*, *supra*, as well the petitioner must, for these cases alone successfully answer petitioner's contention that trolley cars have an absolute right-of-way, and we respectfully submit that the *Kindt* case clearly holds that the circumstances must be carefully considered and no general statement concerning the superior rights of trolley cars nor the failure to see a grade crossing can be applied to all cases which come to the Courts of Pennsylvania, and in the *Kindt* case, *supra*, it was said:

"When this court held that a person on a vehicle *approaching a crossing* must be 'consciously listening' for warning signals, it did not mean to imply that persons riding in vehicles must *always* be 'consciously listening' for warning signals. It meant that they must listen for such signals whenever it is reasonable to believe that other moving objects may possibly be approaching them. If the driver of a car knows or has reason to believe that he is approaching a railroad crossing or a through thoroughfare, he must, of course, 'stop, look and listen.' If he reasonably believes he is on a quiet country road far away from all traffic, he does not have to 'consciously listen' for warning signals. In the instant case the evidence satisfied both the court and the jury that these plaintiffs did not know or have adequate reason to know that they were about to cross a railroad. The degree of attentiveness to which the law holds them must be determined by that

fact. If they were not chargeable with the knowledge of the presence of a railroad crossing, the duty to 'stop, look and listen' at that point was not cast upon them."

It logically follows then that if Mr. Fenimore did not have adequate reason to know he was approaching a railroad crossing, then he was not bound to slow his vehicle to twenty miles per hour, nor was he under the obligation imposed by cases cited by the counsel for the petitioner herein, that where a man cannot see what is coming on the tracks, he is bound to stop and listen. This rule obviously applies only to those who know or have adequate reason to know of the existence of the railroad.

It follows, therefore, that in the present case, it was the duty of the jury to determine from the evidence whether or not Mr. Fenimore had adequate reason to know he was approaching a railroad before any of the duties of a motorist about to cross a grade crossing can be thrust upon him. Evidence shows that his view was obstructed by the truck for about twelve hundred feet (1200') prior to the crossing, and that although this highway is one-way and wide enough for three lanes of traffic, only those in the right-hand lane had benefit of any warning signs. There was no warning sign on the left-hand side of the one-way highway. Evidence showed that the tracks were flush with a black top macadam highway and the color of the right of way is in no way distinguishable from that of the surface of the highway (Record, page 113a).

The petitioner herein further argues that Mr. Fenimore is guilty of negligence for passing a truck that was slowing down. It appears from testimony that Fenimore had a clear vision of what was directly ahead. The truck's slowing down in itself did not necessitate Fenimore's perceiving a dangerous situation was in the making. The truck could be slowing down for a number of reasons: to change drivers, motor trouble, a soft tire, a bad bump in the right-hand lane, or many reasons independent of the conclusions

drawn by counsel that it must spring from the fact that there was an obstruction in front of the truck driver that would eventually become an obstruction to Mr. Fenimore. The respondents contend that it is not "reasonably likely" that someone or something would come from the swamp land on Fenimore's right and cross the highway at a point at least a half mile from the nearest dwellings without warning. His mere passing of a truck which was slowing down does not convict him of negligence. At the most a determination of the inferences to be drawn from these facts was for the jury.

The petitioner's entire case in this Court rests on its contention that the Trial Court and the Court of Appeals should have declared the driver of the automobile, Mr. Fenimore, guilty of contributory negligence as a matter of law. In the case of *Reidinger v. Lewis Jones, Inc., et al.*, 353 Pa. 298, 45 A. (2d) 3, (1945), it is said:

"Contributory negligence will be declared only where it is so clear that reasonable minds cannot differ as to its existence."

The petitioner here contends that the rule in Pennsylvania is that regardless of circumstances, where a motorist is struck immediately upon entering trolley tracks, he is guilty of contributory negligence as a matter of law and must be declared so by the Courts. This is not the law. As a matter of fact, in Pennsylvania in an action in trespass, it is for the Jury to fix the negligence of the defendant. Under no circumstances may a Judge direct a verdict for the plaintiff on oral testimony. The petitioner here is seeking a directed verdict for the petitioner against Mr. Fenimore on oral testimony.

The leading authority for this proposition of law may be found in the opinion in *Nanty-Glo Boro. v. American Surety Company*, 309 Pa. 236. In that case, in an opinion by Mr. Justice Drew, the Court said at page 238:

"In granting plaintiff's motion for binding instructions, the trial judge assumed the testimony of Carlisle and Estep to be true. This he had no right to do, even though it was uncontradicted. In the words of Mr. Justice Sharswood, 'However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence': *Reel v. Elder*, 62 Pa. 308. This rule is firmly established: *Second National Bank v. Hoffman*, 229 Pa. 429; *Newman v. Romanelli*, 244 Pa. 147; *McGlinn Distilling Co. v. Dervin*, 260 Pa. 414; see *Phila. v. Ray*, 266 Pa. 345. The credibility of these witnesses, without whose testimony plaintiff could not have recovered, was for the jury, and plaintiff's motion for binding instructions should not have been granted."

This principle of law was followed in *Schnitzer v. Philadelphia Transportation Company* (et al., Appellant), 354 Pa. 576.

This rule of law was again cited with approval in *Kostello v. Kostello*, Appellant, 159 Pa. Sup. Ct. 194. In that case at page 196 the court entered an opinion by Arnold, J., who said:

"The triers made no findings establishing the facts of this defense of 'violation of positive orders.' In other words, the testimony of the defendant and his son was not believed. It is true that their testimony was uncontradicted but there is not and can never be a rule that the triers of the facts (either an administrative body or jury) *must* accept as true uncontradicted oral evidence."

The Supreme Court of Pennsylvania, as late of January 3, 1949, in the case of *Martino v. Adourian*, 360 Pa. 580,

63 A. (2d) 12, reviewed the decisions having to do with the matter of declaring a person contributorily negligent as a matter of law and said:

“This Court has decided in many cases that contributory negligence may be declared judicially only where it is so clearly revealed that fair and reasonable individuals could not disagree as to its existence: *Altomari v. Kruger, et al.*, 325 Pa. 235, 188 A. 828; *Pesolano, et ux. v. Philadelphia Transportation Company*, 349 Pa. 73, 36 A. (2d) 497; *DiBona Administrator v. Philadelphia Transportation Company*, 356 Pa. 204, 51 A. (2) 768.”

Here the petitioner is complaining of want of care on the part of another when it was solely its own lack of care which caused the accident. Its motorman, knowing of the existence of the Industrial Highway, knowing that there were two lanes for westbound traffic, knowing that each lane might be occupied, knowing that his view of the inner lane was obstructed by the truck, had the responsibility of anticipating that there might be traffic in the inner lane and should have stopped his trolley car before entering the highway and made certain that the trolley car was at least visible to both lanes of traffic.

In *Wagner, Appellant v. Philadelphia Transportation Company*, (this same petitioner), the Supreme Court of Pennsylvania in 252 Pa. 354, 97 A. 471 (1916) said:

“No one can complain of want of care of another where care is only rendered necessary by his own wrongful act * * * In such case the plaintiff was not bound to anticipate the negligent act of the motorman of the car on the near track in failing to look in the direction in which his car was approaching and to keep it under proper control.”

and this is exactly what the petitioner is seeking when it asks that this motorist be declared contributorily negligent as a matter of law.

CONCLUSION.

The petitioner herein is seeking to reverse the District Court and the Circuit Court of Appeals, alleging that the decision in this case as it now stands is in conflict with the settled law of Pennsylvania. We have pointed out in this answer that not only is the decision not in conflict but it is in conformity with the law in Pennsylvania.

The petitioner here is seeking to have the Court resolve a question of fact without submitting it to a Jury and the petitioner points out that the Trial Judge mentioned that there was some question of doubt on the matter of contributory negligence as a matter of law and further points to the dissenting opinion in the United States Court of Appeals for the Third Circuit. We submit that the doubt in the mind of the Trial Judge arose from the facts and circumstances. We submit that viewed in the best light for the petitioner herein (to which view it is not legally entitled), it indicates doubt in the minds of the Justices of the United States Circuit Court of Appeals. Everything in these circumstances points to doubt, not to lack of it, and it is questions of doubt which must always be resolved by juries in Pennsylvania and the United States.

Respectfully submitted,

JOHN V. DIGGINS,
Attorney for Respondents.

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CHARLES ELMORE C

Supreme Court of the United States

October Term, 1948.

No. [REDACTED] 132-133

FLORENCE T. SMITH and JOHN M. SMITH, her husband; BENJAMIN D. FENIMORE; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad Item for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, and FRANCIS A. SMITH,

Respondents.

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner.

vs.

BENJAMIN D. FENIMORE,

Respondent.

ARIGAIL STEENER,

Respondent.

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner.

vs.

BENJAMIN D. FENIMORE,

Respondent.

**ANSWER OF RESPONDENT, BENJAMIN D. FENIMORE.
THIRD-PARTY DEFENDANT. CONTRA PETITION
FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT.**

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IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1948.

Nos. 879, 880.

FLORENCE T. SMITH and JOHN M. SMITH, her husband; BENJAMIN D. FENIMORE; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased; BENJAMIN D. FENIMORE, Administrator of the Estate of Benjamin John Fenimore, Deceased, Trustee ad litem for Benjamin D. Fenimore and Elizabeth S. Fenimore, his wife, and FRANCIS A. SMITH,

Respondents,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

vs.

BENJAMIN D. FENIMORE,

Respondent.

ABIGAIL STERNER,

Respondent,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Petitioner,

vs.

BENJAMIN D. FENIMORE,

Respondent.

ANSWER OF RESPONDENT, BENJAMIN D. FENIMORE,
THIRD-PARTY DEFENDANT, CONTRA PETITION
FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Answer of Benjamin D. Fenimore, Respondent, Third Party Defendant, respectfully represents:

This is an answer to the petition of the Philadelphia Transportation Company for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review judgments affirming judgments of the United States District Court for the Eastern District of Pennsylvania.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

These are actions in trespass for damages arising out of a collision which occurred on the Industrial Highway between Philadelphia and Chester, in the Commonwealth of Pennsylvania, on July 12, 1946 at about 1:25 in the afternoon. Benjamin D. Fenimore was the operator of the automobile which was struck by a trolley of the Philadelphia Transportation Company. Benjamin John Fenimore, the driver's son, Mrs. Florence T. Smith and Mrs. Abigail Sterner were passengers in the automobile which was operated by Benjamin D. Fenimore. Actions were brought by the various plaintiffs for damages arising from the accident. Defendant, the Philadelphia Transportation Company, moved to sever the Action and then brought a Third Party Action in the cause wherein Florence T. Smith, John M. Smith and Abigail Sterner were plaintiffs against Benjamin D. Fenimore as Third Party Defendant.

The Actions were consolidated and tried together before Hon. T. Blake Kennedy and a jury. The case was submitted to the jury on specific questions. The jury assessed the damages, found the defendant's operator negligent and that

Benjamin D. Fenimore was not negligent. Judgments were entered on the findings.

Defendant filed alternative motions for Judgment N. O. V. or new trial as to plaintiffs, and as third party plaintiff filed similar motions with respect to its claim for contribution against third party defendant. All motions were denied. An appeal was taken to the United States Court of Appeals for the Third Circuit. The judgments of the lower court were affirmed. This petition followed.

QUESTION PRESENTED.

Does the mere happening of a collision between a motor vehicle and a trolley car at an unmarked crossing in the open country on a great industrial highway require the Court to rule as a matter of law that the operator of the motor vehicle was contributorily negligent?

(Negatived by the District Court and by the Court of Appeals for the Third Circuit.)

REASONS WHY WRIT SHOULD NOT BE ALLOWED.

The Respondent, Third Party Defendant, feels that it is imperative that the Court view this request for certiorari in its proper light. In order to do so, and to fairly evaluate the merits of the Petitioner's request, it is necessary to understand not only the facts as they should be considered, but the controlling law of the State of Pennsylvania.

A. Controlling Law.

It is admitted by the Respondent, Third Party Defendant, Benjamin D. Fenimore, that the law of Pennsylvania is the controlling law for the actions herein presented. It is also conceded that the United States District Court for the Eastern District of Pennsylvania is bound by the law of Pennsylvania as applied to the facts of the causes tried.

B. Legal Principles Involved.

- (1) *How shall the testimony be considered in the light of Defendant's and Third Party Plaintiff's Motions?*

In any consideration of a Motion for Non Suit, Binding Instructions, a Motion to Dismiss or for Judgment N. O. V., the law of Pennsylvania requires that the evidence shall be read in the light most advantageous to the party in whose favor the verdict has been rendered or its corollary, in the light most adverse to the litigant making such motion.

"In considering a case on a rule for judgment for defendant non obstante veredicto, it is an established proposition that the testimony must be read in the light

most favorable to the plaintiff and the plaintiff must be given the benefit of every fact and inference of fact which may be reasonably deduced from the evidence."

MORIN v. KREIDT, 310 Pa. 90, 96 (1933), 164 A. 799.

Petitioner complains that the Respondent, third party defendant, was guilty of contributory negligence, but the Supreme Court of Pennsylvania in the case of *Cramer v. Aluminum Co.*, 239 Pa. 120, 86 A. 654 (1913), at page 125 said:

"Where the issue of contributory negligence has been submitted to the jury, a finding in favor of the plaintiff will not be set aside unless, upon a review of the evidence in the light most favorable to the plaintiff, it is inconceivable that a mind desiring only a just and proper determination of the question could reasonably reach any other conclusion than that the plaintiff had brought about or contributed to the injury by his own carelessness. That is, after determining all doubts and drawing all inferences in favor of the plaintiff, it must be clear that he was guilty of contributory negligence before it can be so ruled as a matter of law."

The Pennsylvania law not only requires the evidence to be viewed in the light most favorable to the party who has received the verdict, but goes further to add that

"* * * all the facts and proper inferences of fact, which tend to sustain the plaintiff's contention, must be accepted as true, and all those to the contrary, if depending solely upon testimony, must be rejected."

Farley v. Ventresco, 307 Pa. 441, 443, 444 (1932), 161 A. 534.

Even the Petitioner in this case will concede the foregoing to be a correct statement of the law by which his requests are to be judged and determined. Viewed in this light, he

has grossly departed from these principles. The facts as set forth in his Petition are not the evidence produced by the Respondent, Third Party Defendant, nor indeed are they the inferences that most strongly support the contention of the Respondent, Third Party Defendant, and the verdict of the jury. They are the exact opposite. At the very outset, he says "Visibility was good and the surface of the highway dry" and refers to the record. This is in direct conflict with the testimony supporting the contention of the Respondent, Third Party Defendant, which is to the effect that it had been raining and at the time of the accident it was drizzling or misty (64a and 82a). Again, the Petitioner says that the crossing was indicated by signs. Insofar as others than the Respondent, Third Party Defendant, were concerned, this might well be true, but it essentially misleading to the Court in this instance, as the testimony of Fenimore is to the effect that he had been traveling to the left of a large panel-body truck which obstructed the view of the signs on the right hand side of the road. Fenimore had traveled on the left hand lane of a two-lane highway at a distance of 1200 feet, prior to coming to this crossing, so that for all that distance he was unable to, and could not see any sign on his right. It is admitted that there were no signs showing a crossing that were posted or available on the left hand side of this one-way highway; so that for the purpose of this request, the reliance of the Petitioner to the posting of signs is at the best, inapplicable and misleading. So far as this case is concerned, there were no signs showing a crossing.

Again, on page 3, Petitioners refer to the testimony that Fenimore was going 35 miles an hour for the 1200 feet. This is another of these misleading statements. True it is that such a statement may be found in the record, but in view of the verdict of the jury, Fenimore is entitled to the benefit of the most favorable testimony in the case and the Petitioner's counsel are only too well grounded in this knowledge. The case must be determined by the inferences and testimony most favorable to Fenimore. The favorable

inferences and testimony are that Fenimore was traveling at the back of a truck which was proceeding at the rate of 20 miles per hour (66a).

Again, the Petitioner would have the Court believe that Fenimore passed a standing truck and then went 45 feet before there was an accident. Fenimore testified that as soon as he passed the truck the accident occurred. The truck was stopped 10 feet from the nearest rail.

Without enlarging on further discrepancies and inaccuracies in the Petition of Defendant in failing to present the case in the light most favorable to the contention of Respondent, Fenimore, as Plaintiff and Third Party Defendant, as the Pennsylvania law requires, viewed in that light, the accident fairly can be said to have occurred as set forth in the following:

STATEMENT OF FACTS.

On July 12, 1946, about 1:25 P. M., Benjamin D. Fenimore was operating a 1946 Ford sedan westward from Philadelphia toward Chester along the Industrial Highway, a main thoroughfare consisting of two twenty-four (24) foot lanes paved with macadam and separated by a grass plot. At every crossing of the Industrial Highway from Philadelphia to Chester, there is either a stop sign against the street entering the Industrial Highway or a traffic light controlling the intersection (p. 113a). It was the first time Fenimore had ever travelled this road (p. 119a). The day was dull (p. 120a). It had been raining and at the time of the accident it was drizzling a little or was a little misty (p. 64a and p. 82a). The collision occurred at a point one-half mile south[west] of the nearest intersection (p. 115a). At this point the highway passes through swampland where water comes in at high tide (p. 65a). At the crossing the trolley tracks are flush with the highway and the trolley right of

way is the same color as the macadam highway (p. 112a). There was nothing to distinguish the tracks or the right of way from the highway. There were no warning signs or anything of that nature on the left side of the westbound lane to indicate a rail crossing at the site of the accident (p. 121a).

Fenimore was operating the Ford sedan in which the various other plaintiffs were riding. He had been following a truck which had a large solid paneled body at least nine feet high (p. 63a) which was travelling on the right hand side of the westbound lane. At a point about 1200 feet from the rail crossing, Fenimore pulled out from behind the truck into the left hand or passing lane of the westbound highway. He continued in a position with his right front wheel at or about at the left rear wheel of the truck (p. 120a) until the truck slowed down. There was nothing in front of Fenimore at this point to indicate a rail crossing. As far as he could see there was no interruption of, or change in, the macadam highway upon which he had been travelling. His view of the warning signs, which were placed on the right side of the highway only, was obstructed by the high paneled body of the truck. The truck came to a stop about ten (10) feet from the northernmost rail (pp. 83a-88a). Upon passing the truck, Fenimore was struck immediately by the trolley (p. 121a). The trolley was travelling at least 25 miles per hour (p. 84a) and did not decrease its speed approaching or entering the intersection (p. 82a). The trolley did not sound any warning of its approach (p. 85a).

(2) *Do the facts convict Respondent, Third Party Defendant, of negligence as a Matter of Law?*

(a) **What is negligence as defined by the Courts of the Commonwealth of Pennsylvania?**

Negligence in the want of care under the circumstances. It is the circumstances that beget the duties or obligations.

Negligence has been defined by the Pennsylvania Courts as "the absence of care according to the circumstances," *H. W. Ellis v. Lake Shore & M. S. R. Co.* (1891), 138 Pa. 506, 21 A. 140; *Gress v. Ry.* (1900), 14 Pa. Super. Ct. 87; as "the absence of care under the circumstances," *Gaussman v. Ry.* (1914), 55 Pa. Super. Ct. 542, 545; as the "want of ordinary care under the circumstances," *McCloskey v. Chautauqua Ice Co.* (1896), 174 Pa. 34, 34 A. 287; as "the want of care required by the circumstances," *Fredericks v. Atlantic Refining Co.* (1925), 282 Pa. 8, 13, 127 A. 615. See *American Law Institute, Restatement of the Law of Torts*, Section 282, Pennsylvania Annotations and the cases cited therein. As late as 1948 in *Mogren, et ux. v. Gadonas*, 358 Pa. 507, 58 A. 2d 150, the Supreme Court of Pennsylvania in an opinion by Mr. Chief Justice Maxey at page 511 has said "Circumstances alter cases" and again at page 512 "In passing on questions of negligence, courts and juries must consider the realities of the situation. The standard of carefulness is the conduct *under like circumstances* of an average reasonable person possessed of ordinary prudence.

The standard of care of a motorist or the operator of a trolley is defined in the much quoted case of *Galliano v. East Penn Elec. Co.*, 303 Pa. 498, 154 A. 805 (1931) in the following words at page 503:

"It is the duty of the driver of a street car or a motor vehicle at all times to have his car under control, and having one's car under control means having it under such control that it can be stopped before doing injury to any person in any situation that is reasonably likely to arise under the circumstances."

In this more confined definition of negligence, i. e., negligence of an operator of a motor vehicle or street car, the Court again requires examination of the circumstances of each case individually. As in the case of *Reidinger v. Lewis Jones, Inc., et al., Appellants*, 353 Pa. 298 (1946), 45 A. 2d 3, wherein the Court examined the facts and concluded that

they did not constitute a situation "reasonably likely to arise under the circumstances."

(b) Was the question of negligence in this case one for the jury?

It is clear that the circumstances surrounding each case must be carefully considered and no general statement concerning the superior rights of trolley cars nor the failure to see a grade crossing can be applied to all cases which come before the Courts of Pennsylvania. In *Kindt, Appellant v. Reading Company*, 352 Pa. 419, 43 A. 2d 45 (1945), the court stated (p. 423) that

"If the driver of a car knows or has reason to believe that he is approaching a railroad crossing or a through thoroughfare he must, of course, 'stop, look and listen.' If he reasonably believes he is on a quiet country road far away from all traffic, he does not have to 'consciously listen' for warning signals. In the instant case the evidence satisfied both the court and the jury that these plaintiffs did not know or have adequate reason to know that they were about to cross a railroad. The degree of attentiveness to which the law holds them must be determined by that fact. If they were not chargeable with the knowledge of the presence of a railroad crossing, the duty to 'stop, look and listen' at that point was not cast upon them."

In spite of this clear statement of the law of Pennsylvania, the Petitioner avers on pages 9-10 of his petition that it has no application to the instant case. The Respondent, Third Party Defendant, did not know, nor had he reason to know, of the existence of a rail crossing at the point of the collision and therefore can not be charged with negligence as a matter of law for his failure to stop, look and listen at this point, nor his passing a slowing truck on what appeared to be a through highway in the middle of a swamp.

The question of his negligence was properly submitted to the jury which exonerated him of all blame.

CONCLUSION.

Since the question of Respondent, Benjamin D. Fenimore's negligence was submitted to the jury and the jury found a verdict in his favor, this verdict cannot be overruled unless the court is convinced that there is no evidence to support the verdict. The Petitioner attaches importance to the opinion of the Honorable T. Blake Kennedy and of the Honorable Herbert F. Goodrich in stating their doubts as to the negligence of Fenimore. However, the law of Pennsylvania will not permit the verdict to be changed for mere doubt of the court in reviewing the case.

"We agree that there was evidence from which the jury could have concluded that the plaintiff was negligent, but we do not agree that this conclusion is so irresistible that fair and sensible men could not differ as to it and that, therefore, plaintiff's negligence should be declared as a matter of law."

Christ v. Hill Metal and Roofing Co., 314 Pa. 375, 171 A. 607 (1934), at page 380.

"In other words, on a motion for judgment n. o. v., it is not for the court to determine whether or not the court would arrive at a verdict different from the verdict the jury arrived at, but whether or not there was evidence in the case that would negative the theory that the jury's verdict was founded merely upon a guess or conjecture."

Guilinger v. Pennsylvania Railroad Co., 304 Pa. 140, 144 (1931), 155 A. 293.

It is respectfully submitted, therefore, that the facts of this case present a question of negligence distinguishable from all the cases cited by the Petitioner regarding negligence at grade crossings; that the question of the Respon-

dent, Third Party Defendant's negligence *under the circumstances* was properly submitted to the jury; that the verdict of the jury cannot and should not be disturbed under the laws of the Commonwealth of Pennsylvania.

This case was tried for a number of days in the United States District Court on the theory of negligence. Motions for a new trial and judgment N. O. V. were argued and dismissed and from these decisions an appeal was taken to the Court of Appeals for the Third Circuit. In every instance, the case was argued on its merits. It is only for the first time in the Petition to this Court, that there has crept into the case a suggestion of something that counsel feels is, at best, unsportsmanlike, not to give it a better deserved appellation.

It would be a reflection on this Court to assume that they would be interested in or influenced by any facts and circumstances not part of the record, and it does seem that the Petitioner might come to this Court with more grace, honesty and fairness if the following sentence, which is not in any measure supported by the evidence, were deleted from the Petition: "Under such circumstances it seems only proper that his insurance carrier should be required to assume his share of the damages."

WHEREFORE, it is respectfully requested that the Certiorari be refused.

MICHAEL A. FOLEY,
*Attorney for Third Party
Defendant, Respondent.*